

1 Harry A. Safarian (SBN 204106)  
2 THE SAFARIAN FIRM, APC  
3 1000 N. Central Avenue, Suite 210  
4 Glendale, California 91202  
5 Tel: (818) 334-8528  
6 Fax: (818) 334-8107

hs@safarianfirm.com

7 Attorneys for Defendant,  
8 DIANE CAFFERATA  
9 (erroneously sued and served as "DIANE CAFFERATA HUTNYAN")

10 **UNITED STATES DISTRICT COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 MARK HUTNYAN;

13 Plaintiff,

14 v.

15 DIANE CAFFERATA HUTNYAN;  
16 KRISTIAN HERZOG Also Known as  
17 KRIS HERZOG, Individually and Doing  
18 Business as THE BODYGUARD GROUP  
19 OF BEVERLY HILLS; COUNTY OF  
20 LOS ANGELES; RICK TYSON; EDDIE  
21 CARTER; GLENN VALVERDE;  
22 NICHOLAS JOHNSTON; GERMAINE  
23 MOORE; CITY OF MANHATTAN  
24 BEACH; RYAN SMALL; CHAD  
25 SWANSON; CHRIS NGUYEN; TERESA  
26 MANQUEROS,

27 Defendants.

CASE NO. 2:17-cv-00545-PSG-ASx

Hon. Philip S. Gutierrez

**REPLY TO OPPOSITION OF  
PLAINTIFF MARK HUTNYAN TO  
MOTION TO DISMISS PURSUANT  
TO FRCP 12(b)(6)**

**Date:** July 10, 2017

**Time:** 1:30 p.m.

**Judge:** Hon. Philip S. Gutierrez

**Courtroom:** 6A (6<sup>th</sup> Floor)

Complaint Served: Feb. 7, 2017

Response Date: March 30, 2017

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**SUMMARY OF REPLY.**

Plaintiff Mark Hutnyan's complaint seeks to make a federal case out of a dispute between former spouses regarding use of community property. This Courtroom is not the forum for such a dispute. Just as a square peg does not fit into a round hole, Section 1983 liability is inapplicable to defendant Diane Cafferata in this case. A private citizen returned to her home, as permitted under the parties' Marital Settlement Agreement ("MSA"), with the assistance of a private security company. Nor does Plaintiff dispute that Ms. Cafferata had a right to be in the home.

Only by taking a tumble down a rabbit hole with Alice in Wonderland can someone take these basic set of facts and concoct a Section 1983 claim against private actors. This Court should decline Plaintiff's invitation to follow him.

Plaintiff fails to allege any facts past mere conclusions to support his claims that Ms. Cafferata is somehow responsible under a conspiracy theory for the actions taken by other private actors. What is more, Plaintiff fails to allege sufficient facts to show how Ms. Cafferata returning to her home, something Plaintiff admits she was entitled to do, could possibly cause him any harm. The four corners of Plaintiff's complaint admit of no claim for relief for Plaintiff against Ms. Cafferata. Accordingly, the complaint should be dismissed, with prejudice.

**II.**

**PLAINTIFF'S CLAIMS AGAINST MS. CAFFERATA HINGE ON CONSPIRACY ALLEGATIONS THAT DO NOT PLAUSIBLY SUGGEST RELIEF AGAINST HER, REQUIRING DISMISSAL.**

Plaintiff admits that he has not alleged any direct claims against Ms. Cafferata, but rather his claims against Ms. Cafferata are hinged upon his bald allegations of a conspiracy between Ms. Cafferata and other defendants. Opp. at pp.

1 11:4-5, 12:10-27, 16:2-10, and 18:5-8. However, Plaintiff offers nothing more than  
2 the merely conclusory allegation that “Plaintiff is informed and believes and thereon  
3 alleges that at all times mentioned herein, each of the defendants acted in concert  
4 and in furtherance of each other’s interests.” Complaint, ¶ 24. Plaintiff points to no  
5 other allegations in his pleading to support this bald allegation of conspiracy.<sup>1</sup>

6 Such a bald, conclusory, boilerplate allegation of conspiracy against Ms.  
7 Cafferata cannot pass muster. There is no factual content to support the claim of  
8 conspiracy. Indeed, Plaintiff fails to identify Ms. Cafferata by name as a co-  
9 conspirator, who specifically were her alleged co-conspirator state actors, the  
10 formation of the conspiracy, or what act Ms. Cafferata took in furtherance of the  
11 conspiracy. A pleading that offers “labels and conclusions” or “a formulaic  
12 recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v.*  
13 *Twombly*, 550 U.S. 544, 555 (2007). For Plaintiff to avoid dismissal of his claims  
14 against Ms. Cafferata, “the non-conclusory ‘factual content,’ and reasonable  
15 inferences from that content, must be plausibly suggestive of a claim entitling the  
16 plaintiff to relief.” *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9<sup>th</sup> Cir. 2009).  
17 Plaintiff’s bald conspiracy allegations do not plausibly suggest he is entitled to relief  
18 against Ms. Cafferata under any of her claims. Accordingly, all of Plaintiff’s claims  
19 against Ms. Cafferata fail because he fails to allege facts plausibly suggesting the  
20 existence and operation of a conspiracy.

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27 <sup>1</sup> Plaintiff also cites to paragraphs 22 and 23 of his pleading to support his  
28 allegations of conspiracy against Ms. Cafferata. Those paragraphs, however, simply  
make generalized, boilerplate allegations of agency and ratification against all  
defendants.

1 III.

2 **THE COMPLAINT FAILS TO STATE A CLAIM FOR VIOLATION OF**  
 3 **SECTION 1983 BECAUSE NO STATE ACTION IS ALLEGED AND MS.**  
 4 **CAFFERATA IS NOT A STATE ACTOR.**

5 Plaintiff's opposition fails to show any state action is alleged in his complaint.  
 6 Plaintiff's own pleading recognizes Ms. Cafferata entered her home with the  
 7 assistance of a privately retained security company. Complaint, ¶¶ 30-31 & 38.  
 8 That alone should warrant a finding of no state action.

9 Plaintiff, however, argues that off-duty Los Angeles County Sheriff's  
 10 Department deputies that comprised some of the private security company that  
 11 entered the subject premises were somehow acting under the color of state law.  
 12 Under Plaintiff's limitless construct, any off-duty law enforcement officer is always  
 13 acting under color of state law. The law, however, is otherwise.

14 In *Barna v. City of Perth Amboy*, 42 F.3d 809 (3d Cir.1994), a police officer  
 15 attacked an individual, who was his relation by marriage and, of course, therefore  
 16 knew the officer personally. The officer used his service revolver and police-issued  
 17 nightstick, *id.* at 813, yet the court held there was no action under color of state law.  
 18 Merely because a police officer is recognized as an individual employed as a police  
 19 officer does not alone transform private acts into acts under color of state law.

20 Here, Plaintiff does not allege that the private security company including off-  
 21 duty law enforcement officers entered the subject premises claiming to be Los  
 22 Angeles County Sheriff's deputies such that they were acting under color of state  
 23 law. Plaintiff makes no allegation that member of the private security detail  
 24 represented themselves to be Sheriff's deputies. Under such circumstances, the  
 25 members of the private security detail "were "pursuing [their] own goals and [were]  
 26 not in any way subject to control by [their public employer.]" *Mark v. Borough of*  
 27 *Hatboro*, 51 F.3d 1137, 1151 *see also Screws v. United States*, 325 U.S. .91, 111  
 28 (1945) ("[U]nder 'color' of law means under 'pretense' of law. Thus, acts of officers

1 in the ambit of their personal pursuits are plainly excluded.”)

2 There is no allegation the City of Manhattan Beach Police Department  
3 (“MBPD”) did anything to participate in any alleged “home invasion” that forms the  
4 basis of Plaintiff’s complaint. All Plaintiff alleges is that MBPD failed to  
5 investigate or intervene in the alleged “home invasion.” Complaint, ¶¶ 43-44.  
6 Accordingly, there is no state action on the part of MBPD that led to any deprivation  
7 of Plaintiff’s Constitutional rights. To the extent that MBPD did anything to  
8 deprive Plaintiff of any constitutional right— and no such deprivation can be  
9 gleaned—that certainly has nothing to do with Ms. Cafferata.

10 At the end of the day, all we have is a private citizen seeking to return to her  
11 home with the assistance of a private security company. There is no state action to  
12 glean from any of these facts that would warrant the transformation of a dispute  
13 between former spouses into a federal case. Plaintiff’s Section 1983 claim should  
14 be dismissed, with prejudice.

#### 15 IV.

#### 16 **THE COMPLAINT FAILS TO STATE A CLAIM FOR VIOLATION OF** 17 **SECTION 1983 BECAUSE IT DOES NOT IDENTIFY DEPRIVATION OF** 18 **CONSTITUTIONAL RIGHTS OR LAWS OF THE UNITED STATES** 19 **COMMITTED BY MS. CAFFERATA.** 20

21 Plaintiff’s opposition fails to establish any deprivation of his  
22 Constitutional rights by Ms. Cafferata. As explained, Ms. Cafferata had full and  
23 equal rights to the home, and did nothing more than go home (which required  
24 the use of a locksmith when plaintiff violated the MSA by denying her entry  
25 into the jointly owned home). There is no contention Ms. Cafferata made contact  
26 with plaintiff, or otherwise harmed him, or his property. Simply stated, the  
27 complaint does not—and cannot—identify any Constitutional deprivation  
28 committed by Ms. Cafferata against him.

1 More fundamentally, it is mystifying how Plaintiff can believe he was  
 2 deprived of property or subject to an unreasonable search when he knew Ms.  
 3 Cafferata had every right to be in the home under the terms of the MSA.  
 4 Accordingly, Plaintiff cannot make out any deprivation of a Constitutional right  
 5 when Ms. Cafferata had every right to be in the home.

6 The defects with the section 1983 claim are incurable based upon the facts  
 7 within the four corners of the complaint, especially when taking into  
 8 consideration the judicially noticeable MSA and Judgment. Section 1983 claims  
 9 such as Plaintiff's do not belong in this Courtroom. It should be dismissed.

10  
 11 **V.**

12 **DISMISSAL OF THE INTENTIONAL INFLICTION CLAIM IS PROPER**  
 13 **BECAUSE MS. CAFFERATA'S CONDUCT WAS NOT "EXTREME AND**  
 14 **OUTRAGEOUS" AND DID NOT CAUSE "SEVERE EMOTIONAL**  
 15 **DISTRESS."**

16 Plaintiff fails to address Ms. Cafferata's argument she is not liable for the  
 17 *alleged* unauthorized and unratified intentional misconduct of independent security  
 18 agents she hired, and no facts are alleged that she did anything intentionally wrong.  
 19 On this basis alone, Plaintiff's intentional infliction of emotional distress claim  
 20 should be dismissed.

21 The state family law court itself recognized that Ms. Cafferata did nothing  
 22 inappropriate herself. At the family law court hearing, the Honorable Thomas Trent  
 23 Lewis observed:

24 And I want to just say one other thing. The behavior here  
 25 was not the behavior of the Petitioner [Ms. Cafferata] that  
 26 caused the court to decide to issue the restraining order. It  
 27 was the methodology selected by her agent, Mr. Herzog,  
 28 that led to court to make the determination that it made

1 and the way he conducted himself. And he was her agent.  
 2 That's why I made the order, not because of anything she  
 3 personally did that night. I don't think her behavior  
 4 personally was inappropriate. It was consistent with  
 5 tensions that exist between marital couples who are  
 6 divorcing who have difficulty being around each other.  
 7 The one that acted in what I consider a malevolent way  
 8 was Mr. Herzog.

9 *See* Plaintiff's Request for Judicial Notice In Support of Opposition to Defendant  
 10 Diane Cafferata's Motion to Dismiss at Exhibit 1 (Hearing Trans. at 13:20-14:4).

11 Equally important, Plaintiff admits that Ms. Cafferata had every right to be in  
 12 the home. Opp. at 16:11-19. Having admitted that Ms. Cafferata had every right to  
 13 be in the home, Plaintiff simply cannot establish extreme and outrageous conduct by  
 14 her, and Plaintiff certainly fails to do so in his pleading.

15 Moreover, there is no contention Ms. Cafferata made contact with plaintiff,  
 16 or his property, or did anything to cause "severe emotional distress." The complaint  
 17 admits of no facts that Plaintiff suffered "severe emotional distress." Plaintiff  
 18 merely offers the conclusory assertion his emotional distress was "severe," but  
 19 offers no indication of any physical manifestations of distress, or the need for any  
 20 physical or mental care relating to the incidents in question.

## 21 VI.

### 22 **THE "ASSAULT AND BATTERY" CLAIM SHOULD BE DISMISSED AS** 23 **THERE ARE NO FACTS ALLEGED INDICATING MS. CAFFERATA** 24 **MADE, RATIFIED, OR AUTHORIZED A HARMFUL OR OFFENSIVE** 25 **TOUCHING**

26  
 27 Plaintiff's assault and battery claim suffers from the same infirmity as his  
 28 other claims. He makes conclusory allegations without any facts to support his



1 conclusion that he “believed that he would be struck about his body...” Complaint,  
 2 ¶ 71. There are no facts alleged as to why he felt he would be “struck about his  
 3 body.” Nor are there any facts alleged as to what any specific defendant did to  
 4 cause Plaintiff to form this belief.

5 As to the battery claim, Plaintiff again states baldly that he “was struck about  
 6 his body during the invasion into his Home on or about March 25, 2016.”  
 7 Complaint, ¶ 71. There are no facts alleged regarding how he was struck about his  
 8 body and by whom. A claim for relief cannot rest on such factually devoid  
 9 conclusions.

10  
 11 **VII.**  
 12 **CONCLUSION.**

13 Plaintiff has failed to allege sufficient to plausibly suggest he has a viable  
 14 claim against Ms. Cafferata. Nor could he, given his admission that Ms. Cafferata  
 15 had every right to be in the home that formed the basis for this dispute. Accordingly,  
 16 Ms. Cafferata respectfully requests that this Court grant this motion and dismiss  
 17 Plaintiff’s complaint, with prejudice.

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 20 THE SAFARIAN FIRM, APC

21 Dated: June 26, 2017

22 By /s/ Harry A. Safarian

23 Harry A. Safarian  
 24 Attorneys for Defendant,  
 25 DIANE CAFFERATA  
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